

BILL NO. R-94-03 -13

RESOLUTION NO. R-13-94

A RESOLUTION APPROVING A PROJECT COOPERATION
AGREEMENT BETWEEN THE DEPARTMENT OF THE ARMY,
THE CITY OF FORT WAYNE, INDIANA, AND ALLEN COUNTY,
INDIANA, FOR THE CONSTRUCTION OF THE FORT WAYNE
AND VICINITY, INDIANA FLOOD CONTROL PROJECT.

WHEREAS, the United States Department of the Army proposes to construct a 54,000
foot diking project consisting of levees and concrete flood walls to protect flood-prone areas in
the City of Fort Wayne;

WHEREAS, as a condition of federal funding, approval of the City fiscal body is
required;

NOW, THEREFORE, BE IT RESOLVED BY THE COMMON COUNCIL OF THE CITY
OF FORT WAYNE, THAT:

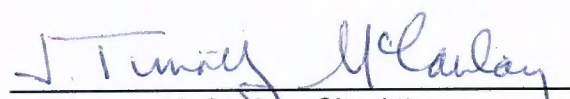
Section 1. The Project cooperation Agreement Between the Department of the Army,
the City of Fort Wayne, Indiana, and Allen County, Indiana for the Construction of the Fort
Wayne and Vicinity, Indiana Flood Control Project, two copies of which are on file and available
for public inspection at the Office of the City Clerk, is hereby approved.

Section 2. The Mayor of the City of Fort Wayne is hereby authorized to execute said
document as well as any supplemental documents, on behalf of the City of Fort Wayne.

Section 3. That this resolution shall be in full force and effect from and after its
passage and any and all necessary approval by the Mayor.


Council Member

APPROVED AS TO FORM AND LEGALITY


J. Timothy McCaulay, City Attorney

Read the first time in full and on motion by Ravine, seconded by _____, and duly adopted, read the second time by title and referred to the Committee on Regulations (and the City Plan Commission for recommendation) and Public Hearing to be held after due legal notice, at the Common Council Conference Room 128, City-County Building, Fort Wayne, Indiana, on _____, the _____ day of _____, 19____, at _____ o'clock _____ M., E.S.T.

DATED: 3-8-94

Sandra E. Kennedy
SANDRA E. KENNEDY, CITY CLERK

Read the third time in full and on motion by Ravine, seconded by _____, and duly adopted, placed on its passage. PASSED ~~LOST~~ by the following vote:

	AYES	NAYS	ABSTAINED	ABSENT
TOTAL VOTES	<u>7</u>		<u>1</u>	<u>1</u>
BRADBURY			<u>✓</u>	
EDMONDS	<u>✓</u>			
GiaQUINTA	<u>✓</u>			
HENRY				<u>✓</u>
LONG	<u>✓</u>			
LUNSEY	<u>✓</u>			
RAVINE	<u>✓</u>			
SCHMIDT	<u>✓</u>			
TALARICO	<u>✓</u>			

DATED: 3-22-94

Sandra E. Kennedy
SANDRA E. KENNEDY, CITY CLERK

Passed and adopted by the Common Council of the City of Fort Wayne, Indiana, as (ANNEXATION) (APPROPRIATION) (GENERAL)

(SPECIAL) (ZONING) ORDINANCE RESOLUTION NO. 9-13-94

on the 22nd day of March, 1994

ATTEST:

(SEAL)

Sandra E. Kennedy
SANDRA E. KENNEDY, CITY CLERK

Don J. Schmitter
PRESIDING OFFICER

Presented by me to the Mayor of the City of Fort Wayne, Indiana, on the 23rd day of March, 1994, at the hour of 11:30 o'clock A. M., E.S.T.

Sandra E. Kennedy
SANDRA E. KENNEDY, CITY CLERK

Approved and signed by me this 29th day of March, 1994, at the hour of 6:00 o'clock P. M., E.S.T.

Paul Helmke
PAUL HELMKE, MAYOR

PROJECT COOPERATION AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY,
THE CITY OF FORT WAYNE, INDIANA,
AND
ALLEN COUNTY, INDIANA
FOR THE CONSTRUCTION OF THE
FORT WAYNE AND VICINITY, INDIANA
FLOOD CONTROL PROJECT

THIS AGREEMENT is entered into this _____ day of _____, 1994, by and between the DEPARTMENT OF THE ARMY (hereinafter the "Government"), acting by and through the Assistant Secretary of the Army (Civil Works), and THE CITY OF FORT WAYNE, INDIANA and ALLEN COUNTY, INDIANA (hereinafter the "Local Sponsors"), acting by and through the Mayor of Fort Wayne, Indiana and the President of the Allen County Board of Commissioners.

WITNESSETH, THAT:

WHEREAS, construction of the Fort Wayne and Vicinity, Indiana, Flood Control Project at the City of Fort Wayne, Indiana was authorized by the Water and Resources Development Act of 1990, Public Law 101-640;

WHEREAS, the Government and the Local Sponsors desire to enter into a Project Cooperation Agreement for construction of Fort Wayne and Vicinity, Indiana, Flood Control Project (hereinafter referred to as the "Project" and defined in Article I.a. of this Agreement);

WHEREAS, Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended, specifies the cost-sharing requirements applicable to the Project;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended, provides that the construction of any water resources project by the Secretary of the Army shall not be commenced until each non-Federal interest has entered into a written agreement to furnish its required cooperation for the Project;

WHEREAS, on 19 May 1988 the Assistant Secretary of the Army (Civil Works) approved a credit with an estimated value of \$1,123,500.00 (one million, one hundred and twenty-three thousand, and five hundred dollars), subject to Government audit, for the Local Sponsors toward the Local Sponsors' share of the total project cost in accordance with Section 104 of the Water Resources Development Act of 1986, Public Law 99-662;

WHEREAS, the Local Sponsors do not qualify for a reduction of the maximum non-Federal cost share pursuant to the guidelines which implement Section 103(m) of the Water Resources Development Act of 1986, Public Law 99-662; and

WHEREAS, the Government and Local Sponsors have the legal authority and capability to perform as hereinafter set forth and intend to cooperate in cost-sharing and financing of the construction of the Project in accordance with the terms of this Agreement.

NOW, THEREFORE, the Government and the Local Sponsors agree as follows:

ARTICLE I - DEFINITIONS AND GENERAL PROVISIONS

For purposes of this Agreement:

a. The term "Project" shall mean the flood control works authorized in the Water and Resources Development Act of 1990, Public Law 101-640, to be constructed in the City of Fort Wayne, Allen County, Indiana as generally described in the General Design Memorandum dated May 26, 1993 and approved by the Chief of Engineers on January 24, 1994. Three separate segments, the West, Central and East, of flood control works are proposed. The East Segment is further broken into the north and south portions for construction purposes. The estimated length of the flood control works is 54,000 feet. The line of protection contains two distinct features, levees and concrete floodwalls, for protection of interior areas from flooding. Other project features include stoplog and clay dike road closure structures, rockfill slope stability improvements, interior flood control improvements for dewatering protected areas, erosion protection, rehabilitation of utilities and streets damaged or revised by the proposed works, superiority protection and backflow prevention around pump stations, toe drains, designated overflow locations for overtopping events, and construction or reconstruction of recreational improvements located on or adjacent to the proposed facilities.

b. The term "total project cost" shall mean all costs incurred by the Local Sponsors and the Government directly related to the construction of the Project. Such costs shall include, but not necessarily be limited to: all continuing planning and engineering costs incurred after October 1, 1985; all advanced engineering and design costs; all preconstruction engineering and design costs; engineering and design costs during construction; actual construction costs, including the costs of constructing, relocating or modifying existing railroad bridges and approaches thereto; supervision and administration costs; the costs of contract dispute settlements or awards; the value of lands, easements, and rights-of-way, including suitable borrow

and dredged or excavated material disposal areas, and the value of relocations, as may be required for the construction, operation, and maintenance of the Project; and the cost of investigations to identify the existence of hazardous substances as identified in Article XVII.a. of this Agreement; but shall not include any cost of operation, maintenance, repair, replacement, or rehabilitation or increased costs for betterments. The term "total project costs" also includes the amount of the Section 104 credit, verified by Government audit, that will be given the Local Sponsors for the compatible flood control work accomplished by the Local Sponsors.

c. The term "Contracting Officer" shall mean a representative of the Government with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings.

d. The term "period of construction" shall mean the time from the advertisement of the first construction contract to the time the Contracting Officer certifies in writing to the Local Sponsors that construction of the Project is complete. The Contracting Officer shall furnish to the Local Sponsors copies of the Government's Written Notice of Acceptance of Completed Work furnished to contractor(s) for all contracts for the Project.

e. The term "highway" shall mean any highway, thoroughfare, roadway, street, or other public road or way.

f. The term "relocations" shall mean the preparation of plans and specifications for, and the accomplishment of, all alterations, modifications, lowering or raising in place, and/or new construction related to, but not limited to, existing: railroads (excluding existing railroad bridges and approaches thereto), highways, and other bridges, buildings, pipelines, public utilities (such as municipal water and sanitary sewer lines, telephone lines, and storm drains), aerial utilities, cemeteries, and other facilities, structures, and improvements determined by the Government to be necessary for the construction, operation, and maintenance of the Project.

g. The term "fiscal year" shall mean one fiscal year of the Government. The Government fiscal year begins on October 1 and ends on September 30.

h. The term "functional portion of the Project" shall mean a completed portion of the Project as determined by the Contracting Officer in writing to be suitable for tender to the Local Sponsors to operate and maintain in advance of completion of the entire Project. For the portion to be suitable for tender, the Contracting Officer must determine that the completed portion of the Project can function independently and for a

useful purpose, although the balance of the Project is not complete.

i. The term "betterment" shall mean the design and construction of a Project feature accomplished on behalf of, or at the request of, the Local Sponsors in accordance with standards that exceed the standards that the Government would otherwise apply for accomplishing the design and construction of the Project.

ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND LOCAL SPONSORS

a. The Government, subject to receiving funds appropriated by the Congress of the United States and using funds provided by the Local Sponsors, shall expeditiously construct the Project (including construction, modification, or relocation of railroad bridges and approaches thereto), applying those procedures usually followed or applied in Federal projects, pursuant to Federal laws, regulations, and policies. The Local Sponsor shall be afforded the opportunity to review and comment on all contracts, including relevant plans and specifications, prior to the issuance of invitations for bids. Before initial construction of the Project can proceed, the Local Sponsors must concur in writing with issuance of the invitation for bids for the first construction contract. To the extent possible, the Local Sponsors thereafter also will be afforded the opportunity to review and comment on all modifications and change orders prior to the issuance to the contractor of a Notice to Proceed. In those cases where providing notice to the Local Sponsors of the required contract modifications or change orders is not possible prior to issuance of Notice to Proceed, such notifications will be provided after the fact at the earliest date possible. The Contracting Officer will, in good faith, consider the comments of the Local Sponsors, but award of contracts, modifications or change orders, and performance of all work on the Project (whether the work is performed under contract or by Government personnel), shall be exclusively within the control of the Contracting Officer.

b. After the Government determines that the Project or a functional portion of the Project is complete, and notifies the Local Sponsors in writing of such determination, the Government shall turn the Project or functional portion of the Project over to the Local Sponsors, which shall accept the Project or functional portion of the Project and be solely responsible for operating, maintaining, repairing, replacing, and rehabilitating the Project or functional portion of the Project in accordance with Article VIII hereof.

c. The Local Sponsors shall contribute through a combination of cash payments, the provisions of Project lands,

easements, rights-of-way and relocations and approved section 104 credits, as herein specified and further specified in Article VI, a minimum of 25 percent, but not to exceed 50 percent, of total project costs.

1. During the period of construction, the Local Sponsors shall provide a cash contribution equal to 5 percent of total project costs.

2. As further specified in Article III hereof, the Local Sponsors shall provide all lands, easements, and rights-of-way, including suitable borrow and dredged or excavated material disposal areas, and perform all relocations determined by the Government to be necessary for construction, operation, and maintenance of the Project.

3. If the value of the contributions provided under paragraphs 1. and 2. of this Article and Section 104 credit, as verified by a Government audit, is less than 25 percent of the total project costs, the Local Sponsors shall provide, during the period of construction, additional cash contributions in the amount necessary to make the Local Sponsors' total contribution equal to 25 percent of total project costs.

4. As further specified in Article VI hereof, the Local Sponsors shall provide during the period of construction, a cash contribution of 50 percent of the total project costs allocated to separable recreation features.

d. The Local Sponsors may request the Government to acquire lands, easement, or rights-of-way, or perform relocations on behalf of the Local Sponsors. Such services as the Government may elect to provide, shall be performed in accordance with terms or conditions of separate agreements and all such work shall be paid for in advance by the Local Sponsors.

e. The Local Sponsors may request the Government to accomplish betterments. The Local Sponsors will be solely responsible for any increase in costs resulting from the betterments, and all such increased costs will be paid in advance by the Local Sponsors in accordance with Article VI.

f. If the value of the contributions provided under paragraphs c.1. and 2. of this Article exceed 50 percent of the total project costs, the Government shall, subject to the availability of funds, reimburse the Local Sponsors for that portion of the value of lands, easements, rights-of-way, and dredged or excavated material disposal areas, and relocations, which exceed 45 percent of the total project costs. Alternately, and at the sole discretion of the Government, the Government may at no cost to the Local Sponsors provide any remaining lands, easements, rights-of-way, relocations, and dredged or excavated

material disposal areas required for the construction, operation, and maintenance of the Project in excess of 45 percent of the total project costs.

g. No Federal funds may be used to meet the Local Sponsors' share of total project costs under this Agreement unless the expenditure of such funds is expressly authorized by statute as verified in writing by the Federal granting agency.

h. The Local Sponsors agree to participate in and comply with applicable Federal flood plain management and flood insurance programs.

ARTICLE III - LANDS, RELOCATIONS, AND PUBLIC LAW 91-646

a. The Government shall provide, in coordination with the Local Sponsors, a written description of the anticipated real estate requirements for the Project. Thereafter, the Local Sponsors shall furnish all lands, easements, and rights-of-way, including suitable dredged or excavated material disposal areas, as may be determined by the Government in that description, or in any subsequent description coordinated with the Local Sponsors, to be necessary for the construction, operation, and maintenance of the Project, and shall furnish to the Government evidence supporting the Local Sponsors' legal authority to grant rights-of-entry to such lands. The necessary lands, easements, and rights-of-way for the Project may be provided incrementally for each construction contract. All lands, easements, and rights-of-way determined by the Government to be necessary for work to be performed under a construction contract must be furnished prior to the advertisement of that construction contract.

b. The Local Sponsors shall provide or pay to the Government the cost of providing all retaining dikes, wasteweirs, bulkheads, and embankments, including all monitoring features and stilling basins, that may be required at any dredged or excavated material disposal areas required for the construction, operation, and maintenance of the Project.

c. Upon notification from the Government, the Local Sponsors shall accomplish or arrange for accomplishment of all relocations determined by the Government to be necessary for the construction, operation, and maintenance of the Project.

d. The Local Sponsors shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended by Title IV of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law 100-17), and the Uniform Regulations contained in 49 CFR Part 24, in acquiring lands, easements, and rights-of-way, and performing relocations for construction, operation, and maintenance of the Project, and

inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE IV - VALUE OF LANDS AND RELOCATIONS

a. The Local Sponsors shall not receive any credit for lands, easements, and rights-of-way, including dredged or excavated material disposal areas, previously provided as an item of cooperation for another Federal project nor shall the value thereof be included in total project costs. The value of the lands, easements, and rights-of-way, including suitable dredged or excavated material disposal areas, to be included in total project costs and credited towards the Local Sponsors' share of total project costs shall be determined in accordance with the following procedures:

1. If the lands, easements, or rights-of-way are owned by the Local Sponsors as of the date the first construction contract for the Project is awarded, the credit shall be the fair market value of the interest at the time of such award or in exceptional circumstances, upon request of the Local Sponsors and in the sole discretion of the Assistant Secretary of the Army for Civil Works, the actual purchase price paid by the Local Sponsors. The fair market value, if used, shall be determined by an appraisal, to be obtained by the Local Sponsors, which has been prepared by a qualified appraiser who is acceptable to both the Local Sponsors and the Government. The appraisal shall be reviewed and approved by the Local Sponsors and the Government.

2. If the lands, easements, or rights-of-way are acquired by the Local Sponsors after the date of award of the first construction contract for the Project, the credit shall be the fair market value of the interest at the time such interest is acquired. The fair market value shall be determined as specified in Article IV.a.1 of this Agreement. If the Local Sponsors pay an amount in excess of the approved appraised fair market value, the Local Sponsors may be entitled to a credit for the actual purchase price paid provided that the purchase price is approved by the Government in writing.

3. If the Local Sponsors acquire more lands, easements, or rights-of-way than the Government determines are necessary for construction, operation, and maintenance of the Project, then only the value of such portions of those acquisitions as have been determined by the Government to be necessary for the construction, operation, and maintenance of the Project shall be included in total project costs and credited towards the Local Sponsors' share.

4. Credit for lands, easements, and rights-of-way acquired through eminent domain proceedings occurring after the date of this Agreement will be based on court awards for the real

property interests taken, or on stipulated settlements or portions of stipulated settlements that have received written Government approval. The fair market value for the purposes of filing an eminent domain proceeding in court shall be based on an appraisal prepared and approved as specified in Article IV a.1. of this Agreement.

5. Credit for lands, easements, or rights-of-way acquired by the Local Sponsors within a five-year period preceding the date of this Agreement, or at any time after this Agreement is signed, will also include the reasonable documented incidental costs of acquiring the interest, e.g., closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, and mapping costs, as well as the actual amounts expended for payment of any Public Law 91-646 relocation assistance benefits provided in accordance with the obligations under this Agreement.

b. The Government shall provide the Local Sponsors with a written description of required relocations. The value of relocations which will be included in total project costs and credited towards the Local Sponsors' share of total project costs shall be determined by the Government as set forth below:

1. Highways and Highway Bridges: Only that portion of the cost as would be necessary to construct substitute highways to the design standard that the State of Indiana would use in constructing a new bridge or highway under similar conditions of geography and traffic loads.

2. Utilities and Facilities, Structures and Improvements (including railroads): Actual relocation costs, less depreciation, less salvage value, plus the cost of removal, less the increased cost of betterments. New materials shall not be used in any alteration or relocation if materials of value and usability equal to those in the existing facility are available or can be obtained as salvage from the existing facility or otherwise, unless the provision of new material is more economical. If, despite the availability of used material, new material is used, where the use of such new material represents an additional cost, such cost will not be included in total project costs, nor credited toward the Local Sponsors' share.

ARTICLE V - CONSTRUCTION PHASING AND MANAGEMENT

a. To provide for consistent and effective communication, the Local Sponsors and the Government shall, prior to the advertisement of the first construction contract, appoint representatives to coordinate on all facets of Project development, including Project design, scheduling, plans, specifications, real estate requirements, award of contracts,

contract modifications and change orders, contract costs, claims, and other related matters.

b. These representatives shall generally oversee the Project construction and shall be identified as the Project Coordination Team. They shall meet regularly during the period of construction and will be informed of all changes in total project costs. The Project Coordination Team shall make recommendations concerning construction as it deems are warranted to the Contracting Officer, including suggestions to avoid potential sources of dispute.

c. The Contracting Officer, shall, in good faith, consider the recommendations of the Project Coordination Team on all matters relating to construction and anticipated requirements for operation, maintenance, repair, replacement, and rehabilitation of the Project. The Contracting Officer, having the legal authority and responsibility for construction of the Project, has discretion to accept, reject, or modify the recommendations of such representatives.

ARTICLE VI - METHOD OF PAYMENT

a. The Local Sponsors shall provide, during the period of construction, cash payments required under Article II of this Agreement. Total project costs are currently estimated to be \$44,738,000.00 (forty-four million, seven hundred and thirty-eight thousand dollars), and the Local Sponsors' share of total project costs is currently estimated to be \$11,260,000.00 (eleven million, two hundred and sixty thousand dollars). In order to meet Local Sponsors' share, the Local Sponsors must provide a cash contribution currently estimated to be \$2,237,000.00 (two million, two hundred and thirty-seven thousand dollars). The dollar amounts set forth in this Article are based upon the Government's best estimates which reflect projections of costs, price level changes, and anticipated inflation and any approved Section 104 credit. Such costs estimates are subject to adjustments based upon cost actually incurred and are not to be construed as the total financial responsibilities of the Government and the Local Sponsors.

b. The Local Sponsors shall provide the Local Sponsors' required cash contribution during the period of construction in accordance with the following provisions:

1. For purposes of budget planning, the Government shall notify the Local Sponsors by [SPECIFIC DATE] of each year of the estimated funds that will be required from the Local Sponsors to meet the Local Sponsors' share of total project costs for the upcoming fiscal year.

2. No later than 60 calendar days prior to the award of the first construction contract, the Government shall

notify the Local Sponsors of the Local Sponsors' share of the total project costs required for the first fiscal year of construction, including the Local Sponsors' share of costs attributable to the Project incurred prior to the initiation of construction. No later than 30 calendar days thereafter, the Local Sponsors shall verify to the satisfaction of the Government that the Local Sponsors have deposited the requisite amount in an escrow or other account acceptable to the Government, with interest accruing to the Local Sponsors.

3. For the second and subsequent fiscal years of Project construction, the Government shall, no later than 60 calendar days prior to the beginning of the fiscal year, notify the Local Sponsors of the Local Sponsors' share of the total project costs for that fiscal year. No later than 30 calendar days prior to the beginning of the fiscal year, the Local Sponsors shall make the necessary funds available to the Government through the funding mechanism specified in Article VI.b.2. of this Agreement.

4. As construction of the Project proceeds, the Government shall, on a regular basis each year, adjust the amounts required to be provided under this paragraph to reflect the actual costs to date. If at any time during the period of construction the Government determines that additional funds will be needed from the Local Sponsors, the Government shall so notify the Local Sponsors, and the Local Sponsors, no later than 60 calendar days from receipt of such notice, shall make the necessary funds available through the funding mechanism specified in Article VI.b.2. of this Agreement.

c. The Government will draw on the escrow or other account provided by the Local Sponsors such sums as the Government deems necessary to cover contractual and in-house fiscal obligations attributable to the Project as they are incurred, as well as Project costs incurred by the Government prior to the initiation of construction.

d. During the period of construction, the Government shall provide quarterly financial reports on the status of the total project costs and the status of contributions made by the Local Sponsors. Upon completion of the Project and resolution of all relevant claims and appeals, the Government shall compute the total project costs and tender to the Local Sponsors a final accounting of the Local Sponsors' share of total project costs.

1. In the event the total contribution by the Local Sponsors is less than the Local Sponsors' required share of total project costs, the Local Sponsors shall, no later than 90 calendar days after receipt of written notice, make a cash payment to the Government of whatever sum is required to meet the Local Sponsors' required share of total project costs.

2. In the event the total contribution by the Local Sponsors is more than the Local Sponsors' required share of total project costs, the Government shall, no later than 90 calendar days after the final accounting is complete, subject to the availability of funds, return the excess to the Local Sponsors, however, the Local Sponsors shall not be entitled to any refund of the 5 percent cash contribution required pursuant to Article II.c.1 of this Agreement. In the event existing funds are not available to repay the Local Sponsors for excess contributions provided, the Government shall seek such appropriations as are necessary to repay the Local Sponsors for excess contributions provided.

ARTICLE VII - DISPUTES

Before any party to this Agreement may bring suit in any court concerning an issue relating to this Agreement, such party must first seek in good faith to resolve the issue through negotiation or other forms of nonbinding alternative dispute resolution mutually acceptable to the parties.

ARTICLE VIII - OPERATION, MAINTENANCE, REPAIR, REPLACEMENT, AND REHABILITATION (OMRR&R)

a. After the Contracting Officer has determined that construction of the Project or functional portion of the Project is complete and provided the Local Sponsors with written notice of such determination, the Local Sponsors shall operate, maintain, repair, replace, and rehabilitate the completed Project, or functional portion of the Project, at no cost to the Government, in accordance with applicable Federal and State laws as provided in Article XII and specific directions prescribed by the Government in an OMRR&R Manual and any subsequent amendments thereto.

b. The Local Sponsors hereby give the Government a right to enter, at reasonable times and in a reasonable manner, upon land that the Local Sponsors own or control for access to the Project for the purpose of inspection, and, if necessary, for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the Project. If an inspection shows that the Local Sponsors for any reason are failing to fulfill the Local Sponsors' obligations under this Agreement without receiving prior written approval from the Government, the Government will send a written notice to the Local Sponsors. If after 30 calendar days from receipt of notice, the Local Sponsors continue to fail to perform, then the Government shall have the right to enter, at reasonable times and in a reasonable manner, upon lands the Local Sponsors own or control for access to the Project for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the Project. No completion, operation, maintenance, repair, replacement, or rehabilitation by

the Government shall operate to relieve the Local Sponsors of responsibility to meet the Local Sponsors' obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to assure faithful performance pursuant to this Agreement.

ARTICLE IX - RELEASE OF CLAIMS

The Local Sponsors shall hold and save the Government free from all damages arising from the construction, operation, maintenance, repair, replacement, and rehabilitation of the Project and any Project-related betterments, except for damages due to the fault or negligence of the Government or the Government's contractors.

ARTICLE X - MAINTENANCE OF RECORDS

Within 60 calendar days of the date of this Agreement, the Government and the Local Sponsors shall develop procedures for keeping books, records, documents, and other evidence pertaining to costs and expenses incurred pursuant to this Agreement to the extent and in such detail as will properly reflect total project costs. The Government and the Local Sponsors shall maintain such books, records, documents, and other evidence in accordance with these procedures for a minimum of three years after completion of construction of the Project and resolution of all relevant claims arising therefrom, and shall make available at their offices at reasonable times, such books, records, documents, and other evidence for inspection and audit by authorized representatives of the parties to this Agreement.

ARTICLE XI - GOVERNMENT AUDIT

The Government shall conduct an audit, when appropriate, of the Local Sponsors' records for the Project to ascertain the allowability, reasonableness, and allocability of the Local Sponsors' costs for inclusion as credit against the Local Sponsors' share of total project costs.

ARTICLE XII - FEDERAL AND STATE LAWS

In the exercise of the Local Sponsors' rights and obligations under this Agreement, the Local Sponsors agree to comply with all applicable Federal and State laws and regulations, including Section 601 of Title VI of the Civil Rights Act of 1964, Public Law 88-352, and Department of Defense Directive 5500.II issued pursuant thereto as well as Army Regulations 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army".

ARTICLE XIII - RELATIONSHIP OF PARTIES

The parties act in an independent capacity in the performance of their respective functions under this Agreement, and none of the parties are to be considered the officer, agent, or employee of any of the others.

ARTICLE XIV - OFFICIALS NOT TO BENEFIT

No member of, or delegate to, the Congress, or resident commissioner, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom.

ARTICLE XV - COVENANT AGAINST CONTINGENT FEES

The Local Sponsors warrant that no person or selling agency has been employed or retained to solicit or secure this Agreement upon agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Local Sponsors for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Agreement without liability, or, in the Government's discretion, to add to the Agreement or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE XVI - TERMINATION OR SUSPENSION

a. If at any time the Local Sponsors fail to make the payments required under this Agreement, the Assistant Secretary of the Army (Civil Works) shall terminate or suspend work on the Project until the Local Sponsors are no longer in arrears, unless the Assistant Secretary of the Army (Civil Works) determines that continuation of work on the Project is in the interest of the United States or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the Project. Any delinquent payment shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13-week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3-month period if the period of delinquency exceeds 3 months.

b. If the Government fails to receive annual appropriations in amounts sufficient to meet Project expenditures for the then-current or upcoming fiscal year, the Government shall so notify the Local Sponsors. After 60 calendar days either party may elect without penalty to terminate this Agreement pursuant to this Article or to defer future performance under this Agreement; however, deferral of future performance under this Agreement

shall not affect existing obligations or relieve the parties of liability for any obligation previously incurred. In the event that either party elects to terminate this Agreement pursuant to this Article, both parties shall conclude their activities relating to the Project and proceed to a final accounting in accordance with Article VI of this Agreement. In the event that either party elects to defer future performance under this Agreement pursuant to this Article, such deferral shall remain in effect until such time as the Government receives sufficient appropriations or until either the Government or the Local Sponsors elect to terminate this Agreement.

ARTICLE XVII - HAZARDOUS SUBSTANCES

a. After execution of this Agreement and upon direction by the Contracting Officer, the Local Sponsors shall perform, or cause to be performed, such investigations for hazardous substances as are determined necessary by the Government or the Local Sponsors to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601-9675, on lands necessary for Project construction, operation, and maintenance. All actual costs incurred by the Local Sponsors that are reasonable and properly allowable and allocable to performance of any such investigations for hazardous substances shall be included in total project costs and cost shared as a construction cost in accordance with 103(a) of Public Law 99-662.

b. In the event it is discovered through an investigation for hazardous substance or other means that any lands, easements, rights-of-way, or disposal areas to be acquired or provided for the Project contain any hazardous substances regulated under CERCLA, the Local Sponsors and the Government shall provide prompt notice to each other, and the Local Sponsors shall not proceed with the acquisition of lands, easements, rights-of-way, or disposal areas until mutually agreed.

c. The Government and the Local Sponsors shall determine whether to initiate construction of the Project, or if already in construction, to continue with construction of the Project, or to terminate construction of the Project for the convenience of the Government in any case where hazardous substances regulated under CERCLA are found to exist on any lands necessary for the Project. Should the Government and the Local Sponsors determine to proceed or continue with construction after considering any liability that may arise under CERCLA, the Local Sponsors shall be responsible, as between the Government and the Local Sponsors, for any and all necessary clean up and response costs, to include the costs of any studies and investigations necessary to determine an appropriate response to the contamination. Such costs shall not be considered a part of total project costs as

defined in this Agreement. In the event the Local Sponsors fail to provide any funds necessary to pay for clean up and response costs or to otherwise discharge the Local Sponsors' responsibilities under this paragraph upon direction by the Government, the Government may either terminate or suspend work on the Project or proceed with further work as provided in Article XVI of this Agreement.

d. The Local Sponsors and the Government shall consult with each other under Article V of this Agreement to assure that responsible parties bear any necessary clean up and response costs as defined in CERCLA. Any decision made pursuant to Article XVII.c. of this Agreement shall not relieve any party from any liability that may arise under CERCLA.

e. As between the Government and the Local Sponsors, the Local Sponsors shall be considered the operator of the Project for purposes of CERCLA liability. To the maximum extent practicable, the Local Sponsors shall operate, maintain, repair, replace and rehabilitate the Project in a manner that will not cause liability to arise under CERCLA.

ARTICLE XVIII - NOTICES

a. All notices, requests, demands, and other communications required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally, given by prepaid telegram, or mailed by first-class (postage pre-paid), registered, or certified mail, as follows:

If to the City of Fort Wayne, Indiana:

Hon. Paul Helmke, Mayor
One East Main Street
Fort Wayne, Indiana 46802

If to Allen County, Indiana:

The Board of Commissioners of
Allen County, Indiana
Room 200
One East Main Street
Fort Wayne, Indiana 46802

If to the Government:

District Engineer
Detroit District
Corps of Engineers
P.O. Box 1027
Detroit, Michigan 48231-1027

b. A party may change the address to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

c. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee either at such time as it is personally delivered or seven calendar days after it is mailed, as the case may be.

ARTICLE XIX - CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

ARTICLE XX - SECTION 902 PROJECT COST LIMITS

The Local Sponsors have reviewed the provisions set forth in Section 902 of P.L. 99-662, as amended, and understands that Section 902 establishes maximum total project costs. For purposes of this Agreement, the Section 902 cost limit is \$_____, calculated on_____, 19__ using October 1, 19__ price levels and allowances for anticipated future inflation. This amount is calculated using procedures set forth in Appendix P of ER 1105-2-100. It shall be adjusted to allow for appropriate increases for inflation and changes in total project costs as provided in Section 902. Should this cost maximum be reached, no additional funds may be expended on the Project until additional authority is obtained from Congress.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the Assistant Secretary of the Army (Civil Works).

THE DEPARTMENT OF THE ARMY

THE CITY OF FORT WAYNE,
INDIANA

BY: _____
[SIGNATURE]
[TYPED NAME]
Assistant Secretary
the Army (Civil Works)

BY: _____
[SIGNATURE]
Hon. Paul Helmke,
Mayor
City of Fort Wayne
Indiana

DATE: _____

DATE: _____

THE BOARD OF COMMISSIONERS FOR ALLEN COUNTY, INDIANA

BY: _____
[SIGNATURE]
Jack Worthman
County Commissioner

BY: _____
[SIGNATURE]
Jack McComb
County Commissioner

DATE: _____

DATE: _____

BY: _____
[SIGNATURE]
Ed Rousseau
County Commissioner

DATE: _____

CERTIFICATE OF AUTHORITY

I, _____ do hereby certify that I am the principal legal officer of the City of Fort Wayne, Indiana that the City of Fort Wayne is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the City of Fort Wayne in connection with the Project, and to pay damages, if necessary, in the event of the failure to perform, in accordance with Section 221 of Public Law 91-611, and that the persons who have executed this Agreement on behalf of the City of Fort Wayne have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____ 19____.

[SIGNATURE]
[TYPED NAME]
[TYPED TITLE]

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000.00 and not more than \$100,000.00 for each such failure.

Hon. Paul Helmke
Mayor
City of Fort Wayne, Indiana

CERTIFICATE OF AUTHORITY

I, _____ do hereby certify that I am the principal legal officer of Allen County, Indiana, that Allen County is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and Allen County in connection with the Project, and to pay damages, if necessary, in the event of the failure to perform, in accordance with Section 221 of Public Law 91-611, and that the persons who have executed this Agreement on behalf of Allen County have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this _____ day of _____ 19____.

[SIGNATURE}
[TYPED NAME]
[TYPED TITLE]

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000.00 and not more than \$100,000.00 for each such failure.

[SIGNATURE]

President

The Board of Commissioners of
Allen County, Indiana

ESCROW AGREEMENT
BETWEEN
THE CITY OF FORT WAYNE, INDIANA
ALLEN COUNTY, INDIANA
THE DEPARTMENT OF THE ARMY
AND
[FULL NAME OF FINANCIAL INSTITUTION]

This Agreement, made and entered into this _____ day of _____, 199 , by and between the City of Fort Wayne, Indiana and Allen County, Indiana (hereinafter the "Local Sponsors"), the Department of the Army (hereinafter the "Government") and the [FULL NAME OF INSTITUTION], (hereinafter the ("Bank")), WITNESSETH THAT:

WHEREAS, on [EFFECTIVE DATE OF PCA], the Local Sponsors and the Government entered into a Project Cooperation Agreement for the construction of the Fort Wayne and Vicinity, Indiana, Flood Control Project; and,

WHEREAS, pursuant to the Project Cooperation Agreement, the Local Sponsors are required to contribute, over the period of construction of the Project, a cash contribution calculated in accordance with said Agreement; and,

WHEREAS, the Local Sponsors and the Government have agreed that the required contribution may be deposited into an escrow account and held therein until the Government withdraws the funds in accordance with the Project Cooperation Agreement; and,

WHEREAS, the Bank has agreed to serve as depositary for the escrow account and to accept appointment as escrow agent;

NOW, THEREFORE, the parties agree as follows:

1. The Bank is hereby appointed as the escrow agent for the Local Sponsors and is designated the depositary for the monies delivered by the Local Sponsors pursuant to the aforementioned Project Cooperation Agreement. The Bank shall establish "The Fort Wayne and Vicinity, Indiana Flood Control Project Construction Fund" (hereinafter the "Escrow Account") into which shall be deposited the funds delivered by the Local Sponsors.

2. In accordance with the method of payment provisions of the Project Cooperation Agreement, the Local Sponsors shall absolutely and irrevocable deliver to the Bank the funds required to be provided to the Government during the construction period.

3. The funds held in the Escrow Account shall earn interest at a rate as the Bank and the Local Sponsors may mutually agree. To the extent the Local Sponsors authorize the

Bank to invest the funds in any instrument other than an interest-bearing account, savings certificate, or certificate of deposit of the Bank itself, such investment shall be only in direct obligations of the Government of the United States of America or in obligations of agencies or insurers that are guaranteed by the Government of the United States of America. Any instrument must be subject to redemption on or prior to the dates the funds will be needed by the Government. Interest on the funds deposited shall accrue and belong to the Local Sponsors, and shall be payable to the Local Sponsor as the Bank and the Local Sponsors may agree.

4. The Government, acting pursuant to the terms of the Project Cooperation Agreement, shall have the sole and unrestricted right to draw upon all or any part of the funds deposited in the Escrow Account. A written demand for withdrawal shall be made to the Bank by the District Engineer, USAED, Detroit, or his designee, with a copy of said demand provided to the Local Sponsors. Within 10 days of receipt of the demand, the Bank shall pay to the Government the amount requested to the extent such amount does not exceed the balance available in the Escrow Account. All payments shall be in the form of bank drafts payable to the "FAO, USAED, DETROIT", and shall be mailed or otherwise delivered to the Government as specified below in paragraph 9.

5. Upon receipt of signed certification by the Government that no further demand for payment of money will be made, the Bank shall complete a final accounting of other obligations required under this Agreement, and pay over any remaining balance to the Local Sponsors.

6. The fee to be paid to the Bank for the services provided hereunder shall be as the Bank and the Local Sponsors may mutually agree. Any fee paid to the Bank shall be the sole responsibility of the Local Sponsors. The Bank shall have no right to deduct monies from the principal escrow sum to pay for its services. In the event the Local Sponsors fail to make payment to the Bank for its services, all claims for such payment shall be made directly against the Local Sponsors. The Government shall not be responsible for any costs attributable to the establishment, maintenance, administration, or any other aspect of the Escrow Account.

7. Account statements shall be rendered by the Bank to the Local Sponsors and the Government once monthly, and shall show deposits, disbursements, and balances, and the dates thereof. Upon receipt by the Bank of the certification specified in paragraph 5 above, the Bank shall prepare a final accounting showing all transactions relating to the Escrow Account and provide said accounting to the Local Sponsors and the Government at the addresses shown in paragraph 9.

8. It is understood and agreed that the Bank shall not be liable or responsible to ascertain the terms or conditions of any provision of the aforementioned Project Cooperation Agreement between the Local Sponsors and the Government. It is further understood and agreed that if any controversy arises between the Government and the Local Sponsors, or with any other party with respect to the subject matter of this Agreement, the Bank is authorized, unless precluded by order of a court of competent jurisdiction, to disburse monies to the Government in accordance with the terms of this Agreement.

9. All notices, requests, demands, and other communications required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally, given by prepaid telegram, or mailed by first-class (postage pre-paid), registered, or certified mail, as follows:

If to the City of Fort Wayne, Indiana:

Hon. Paul Helmke, Mayor
One East Main Street
Fort Wayne, Indiana 46802

If to Allen County, Indiana:

President
The Board of Commissioners of
Allen County, Indiana
Room 200
One East Main Street
Fort Wayne, Indiana 46802

If to the Government:

District Engineer
Detroit District
Corps of Engineers
P.O. Box 1027
Detroit, Michigan 48231-1027

If to the Bank:

10. Nothing in this Agreement shall be considered as vesting title in the Bank to the amount deposited, except as Trustee for the Local Sponsors and the Government for the purposes set forth herein. Title to said funds shall not vest in

the Government until payment to the Government is made as provided herein.

11. This Agreement shall take effect upon the initial deposit of funds into the Escrow Account by the Local Sponsors and shall continue in full force until the certification specified in paragraph 5 hereof is received by the Bank and the balance remaining is returned to the Local Sponsors, unless earlier terminated by the written mutual agreement of the Local Sponsor and the Government.

12. This Agreement may not be amended, except by written modification signed by the parties hereto.

IN WITNESS WHEREOF, the Local Sponsors, the Government, and the Bank have executed this Agreement on the date first above written.

THE DEPARTMENT OF THE ARMY

THE CITY OF FORT WAYNE,
INDIANA

BY: _____
[SIGNATURE]
[TYPED NAME]
Assistant Secretary
the Army (Civil Works)

BY: _____
[SIGNATURE]
Hon. Paul Helmke,
Mayor
City of Fort Wayne
Indiana

ATTEST: _____

ATTEST: _____

ALLEN COUNTY, INDIANA

THE BANK

BY: _____
[SIGNATURE]
[TYPED NAME]
[TITLE]
President
The Board of Commissioners
Allen County, Indiana

By: _____
[SIGNATURE]
[TYPED NAME]
[TITLE]

ATTEST: _____

ATTEST: _____

Admn. Appr. _____

DIGEST SHEET

TITLE OF ORDINANCE Resolution approving an Agreement between the Department of the Army, the City of Fort Wayne, and Allen County for the Army Corps of Engineers Flood Control Project.

DEPARTMENT REQUESTING ORDINANCE Mayor's Office

SYNOPSIS OF ORDINANCE Approval of agreement between the City of Fort Wayne, the Department of the Army, and Allen County for the Army Corps of Engineers diking project.

EFFECT OF PASSAGE Project will occur.

D9-94-03-13.

EFFECT OF NON-PASSAGE Project will not occur.

MONEY INVOLVED (Direct Cost, Expenditures, Savings) \$44,738,000

ASSIGNED TO COMMITTEE _____

BILL NO. R-94-03-13

REPORT OF THE COMMITTEE ON
REGULATIONS
REBECCA J. RAVINE - MARK E. GIAQUINTA - CO-CHAIR
DONALD J. SCHMIDT
JANET G. BRADURY

WE, YOUR COMMITTEE ON REGULATIONS TO WHOM WAS

REFERRED AN (~~ORDINANCE~~) E (RESOLUTION) APPROVING THE PROJECT
COOPERATION AGREEMENT BETWEEN THE DEPARTMENT OF ARMY, THE CITY OF
FORT WAYNE, INDIANA, AND ALLEN COUNTY, INDIANA, FOR THE CONSTRUCTION
OF THE FORT WAYNE AND VICINITY, INDIANA FLOOD CONTROL PROJECT

HAVE HAD SAID (~~ORDINANCE~~) (RESOLUTION) UNDER CONSIDERATION
AND BEG LEAVE TO REPORT BACK TO THE COMMON COUNCIL THAT SAID
(~~ORDINANCE~~) (RESOLUTION)

DO PASS

DO NOT PASS

ABSTAIN

NO REC

Rebecca Ravine

Mark E. Giaquinta

Donald J. Schmidt

Janet G. Bradury

Janet G. Bradury

DATED:

3-22-94

Sandra E. Kennedy
City Clerk